IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.340 OF 1988.

Chhaganlal Hemchand Doshi)
since deceased through his)
legal heirs :-)
1.Smt.Sonubai Chhaganlal Doshi.)
2.Ramanlal Chhaganlal Doshi.)
3.Sou.Shobha Shantilal Gandhi,)
1 to 3 r/o Gujar Galli,)
Tal.Karmala, Dist.Solapur.)
4.Ashok Chhaganlal Doshi.)
R/o Lasurje, Tal.Indapur.)
Dist.Pune.)
5.Sou.Alka Anil Doshi.)
R/o Dharmapuri, Tal.Malshiras,)
Dist.Solapur.).. Appellants.

V/s.

Popatlal Hemchand Doshi,)
R/o Phaltan, Dist.Satara.).. Respondent.

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Shri A.A.Kumbhakoni, advocate appearing for Appellants.

Shri R.S.Kate, advocate appearing for Respondent.

CORAM: A.S.OKA, J.

DATED: 25th February, 2005.

JUDGMENT:

1. I heard both the learned counsel for the parties. Shri Kumbhakoni, the learned Advocate for the Appellants states that first legal representative of the deceased Appellant has expired during the pendency of the Second Appeal and 2nd to 5th legal representatives of the

original Appellant are the only legal representative of the First legal representative and hence there is no abatement of the Second Appeal against the Appellant.

2. This Second Appeal was admitted on 6th July, 1988. This Court observed that Grounds 1 to 4 raise substantial questions of law. Grounds No. 1 to 4 reads thus :

1. Whether the plaintiff was entitled for partition and possession of suit property even when there is a document dated 15-3-1948 executed by the plaintiff at Exh.36, relinquishing his right, title and interest in the suit lands ?

2. Whether the plaintiff is estopped from claiming his share in the suit property in view of the document at exh.36, whereby he relinquished his claim over suit property ?

3. Whether the lower appellate Court is justified in holding that the

plaintiff is entitled to partition and separate possession of suit properties in view of the fact that all the properties of the joint family were not brought into hotch potch, and therefore the suit of the plaintiff for partition and possession of joint properties is not maintainable ?

4. Whether the appellant/defendant has become owner of the suit property by adverse possession as rightly held by the Trial Court, as the defendant is exclusively, openly, continuously and without obstruction in possession of the land since 1958 ?

3. The Appellant is the original Defendant and the Respondent is the original Plaintiff. The Appellant and Respondent are real brothers. A Suit for partition was filed by the Respondent against the Appellant. Suit properties are one agricultural land and one house property. The case of the Respondent is that father of the

parties expired on 5th February, 1956. Notice was issued on 8th August, 1981 by the Respondent to the Appellant and thereafter, suit was filed.

4. The suit was contested by the Appellant by contending that the suit house was mortgaged and was put to auction in execution proceedings. It is contended that the suit house was not available for partition. The Appellant placed reliance on writing dated 15th March, 1948. In the said writing, the Respondent referred to pending litigations in this Court in respect of the tenanted agricultural land. In the said writing, Respondent stated that he was not ready to contribute towards expenses of the litigations and in case, the land was released, he will not claim any share. Therefore, it was contended that the Respondent relinquished his right, title and interest in respect of the agricultural land in favour of the Appellant.

5. It was contended that after his marriage, the Respondent/Plaintiff started residing with his in-laws and started his own business by utilising funds of the Joint family and acquired certain properties. As the said properties are acquired

from nucleus of the joint family fund, the Appellant is entitled to claim a share in the said properties. It is contended that the said property acquired by the Respondent/Plaintiff is not made subject matter of the suit. In the alternative, it is contended that the Appellant has perfected his title to the suit house by adverse possession. The Trial Court dismissed the suit. However, in an Appeal preferred by the Respondent, decree of the Trial Court has been set aside and the decree for partition is sought getting 1/2 share in favour of the Respondent.

6. Shri Kumbhakoni, the learned Advocate for Appellant submitted that as relinquishment of share in joint family was made by the Respondent in favour of the Appellant, the same does not require registration and there can be oral relinquishment. He placed reliance on a Judgment of this Court reported in **AIR 1965 Bombay 74, Ramdas Chimna V/s. Pralhad Deorao & Ors.** He submitted that the Trial Court has held that the Respondent did not establish that the property standing in his name was his self-aquired property and the Respondent did not produce books of accounts which are admittedly in his custody. He

submitted that there is clear relinquishment in so far as the agricultural land is concerned. He relied upon the findings of the Trial Court to the effect that the Appellant has perfected his title to the suit house by adverse possession.

7. I have considered rival submissions. The case of the Appellant is specific. It is contended that relinquishment is by writing dated 15th March, 1948 at Exh. 36. It is not the case of the Appellant that there is an oral relinquishment. Therefore, decision of this Court in the case of **Ramdas(Supra)** will not help the Appellant. This Court has held that there can be oral relinquishment by mother of her interest in the joint family property in favour of the sons as it is mere abandonment. However, this Court has held that if such relinquishment is executed by a written document, it certainly requires registration under section 17 of Indian Registration Act, 1908. Thus, the said decision is of no assistance to the Appellant. The Appellate Court is right when it was held that the document at Exh.36 cannot be read in evidence as as the same is not duly stamped and registered.

8. In so far as contention regarding non-inclusion of certain properties standing in the name of the Respondent is concerned, the Trial Court has not recorded any finding that nucleus of the joint family was available from which the Respondent could have acquired properties in his name. There is nothing on record to show that existence of nucleus was established by the Appellant.

9. If the Appellant/Defendant fails to establish existence of nucleus, the burden never shifted on the Respondent/Plaintiff to prove that the properties were acquired from his own income. Therefore, the Appellate Court was right when the said contention of the Appellant was not upheld.

10. In so far as, bar of limitation and adverse possession are concerned, for non-suiting Respondent what was required to be proved was a clear ouster. The finding in favour of the Appellant recorded by the Trial Court is not of ouster. In any case, as held by the Appellate Court, ouster was not proved and therefore, a cause of action arose on the date on which the Appellant refused to hand over possession of

separate share of the Respondent.

11. Hence, no fault can be found in decree passed by the Appellate Court. No substantial question of law arises. The Second Appeal is dismissed with no order as to costs.

JUDGE